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80-490

In the Supreme Court of the United States

No.
Term 1980

JOSEPH NICHOLAS PECORA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit's failure to reverse Petitioner's conviction for failure to charge that the Government must prove, beyond a reasonable doubt, that Defendant must be predisposed to commit the offense for which he is has been charged, should stand in light of the Fifth Circuit Court of Appeals opinion in ***United States v. Wolf,*** 594 F2.d 77, (5th Cir. 1979) and the District of Columbia Court of Appeals in ***Hansford v. United States,*** 303 F.2d 219 (D.C. Cir. 1962)?

2. Whether a county prosecuting attorney's office is an enterprise which engages in or affects interstate or foreign commerce within the scope of the Racketeer Influence Corrupt Organization Statute (RICO) 19 U.S.C. §1961-1968?

3. Whether the Fourth Circuit's holding that the term "Enterprise", within the scope of the Racketeer Influence Corrupt Organization Statute (RICO) 19 U.S.C. §1961-1968 encompasses an illegal association that is proved only by facts constituting the "pattern of racketeering activity," should stand in light of the Eighth Circuit Court of Appeals decision in ***United States v. Anderson and Mooney,*** 79-1809?

4. Whether the Fourth Circuit's failure to reverse petitioner's conviction for failure to charge that there must be more than one predicate offense for conviction under 18 U.S.C. §1962 (d) Conspiracy, should stand in light of the Fifth Circuit Court of Appeals decision in ***United States v. Elliott,*** 571 F.2d 880 (1977)?

5. Whether the Fourth Circuit failure to reverse Petitioner's conviction on the basis of the Government's reference to evidence which had been excluded, should stand in light of ***United States v. Leon,*** 534 F.2d 667 (6th. Cir. 1976)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	1
ORDERS AND OPINION BELOW	1
JURISDICTION	2
CITED STATUTES:	
18 U.S.C.S. §1962	2
18 U.S.C.S. §371	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	21
APPENDIX:	
ORDER & OPINIONS	APPENDIX A-M

TABLE OF CITATIONS

Page

Berger v. United States, 295 U.S. 78, 88, 58 S. Ct. 629 (1930) 17

Garris v. United States, 309 F.2d 862 (D.C. Cir. 1968) .. 18

Hansford v. United States, 303 F.2d 219 (D.C. Cir.) 1962 ..... i, 6, 7

Ketchum v. United States, 354 F.2d 715, 719 (1st Cir. 1965) 18

McMillan v. United States, 363 F.2d 165, (5th Cir. 1966) 17

Rewis v. United States, 401 U.S. 808, 912, 91 S.Ct. 1056 (1955) 12

Robinson v. United States, 32 F.2d 505, 510 (8th Cir. 1929) 20

United States v. Altese, 542 F.2d 104 (2nd Cir. 1976) ... 11

United States v. Anderson & Mooney, No. 79-1089 ..... i, 13, 14

United States v. Borum, 484, F.2d 424, 427 (D.C. Cir. 1978) 7

United States v. Campanale, 518 F.2d 352 (9th Cir. 1975) *cert. denied* 423 U.S. 1050, 96 S.Ct.777 (1976) 11, 15

United States v. Cappetto, 502 F.2d 1350 (7th Cir. 1974) *cert. denied* 420 U.S. 925, 95 S.Ct. 1121, (1975) 11

United States v. Elliott, 571 F.2d 880 (1977) ..... i, 15

United States v. Frumento, 563 F.2d 1083 (3rd Cir. 1977) 10

United States v. Hawes, 529 F.2d 472 (5th Cir. 1976) ... 11

Page

United States v. Leon, 534 F.2d 667 (6th Cir. 1976) ..... i, 17, 19, 20, 21

United States v. Kessler, 449 F.2d 1315 (2nd Cir. 1971) 15

United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir. 1969) 11

United States v. Nerone, 563 F.2d 836 (7th Cir. 1977) 11

United States v. Sutton, 604 F.2d 260, 268 (6th Cir. 1979) 11

United States v. Wolffs, 594 F.2d 77 (1979) ..... i, 6, 8

United States v. Vignola, 464 Fed. Supp. 1091 (1979) .. 12

STATUTES

18 U.S.C.S. §1962(c) 2, 5, 12, 16

18 U.S.C.S. §371 ..... 3, 12, 15, 16

Title IX 84 Statute 947 11

Others:

124 U.P.A.L. Rev. 192, 196 (1975) 10

Pub.L.No. 91-452 §903(a) 11

LIST OF THE PARTIES

The following original defendants were indicted along with the Petitioner, Joseph Nicholas Pecora: Robert E. Altomare, Leonard Z. Alpert, Joseph Aperfine, Donald "Dingbat" DeLong and Constance "Gus" Karas.

ORDERS AND OPINIONS BELOW

The Order of the District Court continuing bond previously set was filed on February 26, 1979, and is reprinted as Appendix A.

The Order of the District Court extending the deadline for Pre-Trial Motions was filed on February 27, 1979, and is reprinted as Appendix B.

The Opinion of the District Court denying Petitioner's Pre-Trial Motions for Bill of Particulars, Discovery and Suppression, filed April 4, 1979, is reprinted as Appendix C.

On April 12, 1979, the original indictment was dismissed and is reprinted as Appendix D.

On April 23, 1979, the District Court issued a Bond Continuance which is reprinted as Appendix E.

The District Court issued a Continuance on April 26, 1979, and it is reprinted as Appendix F.

On May 3, 1979, Petitioner was denied a Motion for a Bill of Particular and Motion to Dismiss Indictment which is reprinted as Appendix G.

The Order of the District Court granting a Continuance of Pre-Trial Motions and Sentencing was filed October 4, 1979, and it is reprinted as Appendix H.

On October 23, 1979, the District Court denied Defendant's Motion for Continuance, and it is reprinted as Appendix I.

On October 26, 1976, the District Court granted Defendants additional time to review transcript. The Order is reprinted as Appendix J.

The Judgement and Probation/Committment Order of the District Court filed November 1, 1979, is reprinted as Appendix K.

The Opinion of the Fourth Circuit Court of Appeals, filed July 1, 1980, is reprinted as Appendix L.

The denial of Petition for Rehearing issued by the Fourth Circuit, filed July 28, 1980, is reprinted as Appendix M.

JURISDICTION

The Judgement Order of the United States Court of Appeals for the Fourth Circuit (Appendix L) was entered July 1, 1980. A timely Petition for Rehearing was denied July 28, 1980. (Appendix M)

The jurisdiction of the Fourth Circuit Court of Appeals was invoked in accordance with 28 U.S.C. §1291.

Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within sixty (60) days after the entry of the Court of Appeal's final Order.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CITED STATUTES

18 U.S.C.S. §1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which

effect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the controll of the issuer, or of assisting another to do so, shall not be lawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchases do not amount in the aggregate to 1% of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate of foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section. Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941.

18 U.S.C.S. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.
(June 25, 1948, ch 645, §1, 62 Stat. 701.)

STATEMENT OF CASE

Ronald Donnell was the elected Sheriff of Hancock County, West Virginia, after July 1, 1977, and Robert G. Altomare was the County's prosecuting attorney.

Being aware of widespread gambling in the county for some time, Donnell became involved in an undercover investigation which initially involved the State Police and the Federal Law Enforcement Authorities. The investigation began in November, 1977.

Once Silvo (Birdie) Pinciaro had offered to support Donnell in his election in exchange for the Sheriff's assistance in helping Pinciaro take over the gambling activities in Weirton, West Virginia.

To accomplish this goal, Pinciaro and Donnell instigated several raids in the Weirton area in order to intimidate the gambling operators into paying for protection.

A trial, evidence of a taped conversation between Petitioner and Donnell was introduced. The government theorized that said conversation involved payoffs for protection for a barbout (dice) game allegedly operated by Petitioner.

On February 6, 1979, Petitioner, Joseph N. Pecora, was indicted at Criminal Numbers 79-00003-E-06 and 79-00003-E-02 in the United States District Court for the Northern District of West Virginia. On April 5, 1979, a superseding indictment was returned. The indictment charged him with a single count (Count 2) of violating 18 U.S.C. §1962(d) the Racketeer Influence and Corrupt Organizations Act (RICO).

Specifically, the indictment alleged that from January 1, 1977, to January, 1979, in Hancock County, West Virginia, Pecora and five (5) other individuals conspired to commit an offense, to-wit: 18 U.S.C. §1962(c). Concerning Pecora, it was alleged that certain monies were paid on his behalf to Robert G. Altomare, Prosecuting attorney of Hancock County and Ronald A. Donnell, Sheriff of Hancock County, for the return of various slot machines which had earlier been seized in raids conducted by the Sheriff's office, and as protection money for a dice game operated in the county. Pre-Trial Motions were filed, and the District Court, Honorable Robert E. Maxwell, District Judge, ruled upon them (Appendix B). After a severance of several defendants was ordered on May 21, 1979, a jury trial was convened involving co-defendants Karas, Pecora and Donald DeLong.[1] On May 25, 1979, the jury returned verdicts of guilty as to each defendant.

After Post-Trial Motions (Appendix F) were orally denied, Petitioner was sentenced to five (5) years imprisonment and ordered to pay a $10,000.00 fine (Appendix G).

Petitioner appealed to the Fourth Circuit Court of Appeals. On July 1, 1980, Petitioner's conviction was affirmed (Appendix L).

Petitioner then made petition to the Fourth Circuit for Rehearing, and was denied such on July 28, 1978, (Appendix H).

Your Petitioner, Joseph Nicholas Pecora, now prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on July 1, 1980, and the Order denying the Petition for Rehearing dated July 28, 1980.

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[1]Subsequent to trial, Mr. DeLong died. Mr. Karas was convicted along with Petitioner.

REASONS FOR GRANTING THE WRIT

1. **WHETHER THE FOURTH CIRCUIT'S FAILURE TO REVERSE PETITIONER'S CONVICTION FOR FAILURE TO CHARGE THAT THE GOVERNMENT MUST PROVE, BEYOND A REASONABLE DOUBT, THAT DEFENDANT MUST BE PREDISPOSED TO COMMIT THE OFFENSE FOR WHICH HE HAS BEEN CHARGED, SHOULD STAND IN LIGHT OF THE FIFTH CIRCUIT COURT OF APPEALS IN *UNITED STATES v. WOLF* 594 F.2d 77 (5th Cir. 1979) AND THE DISTRICT OF COLUMBIA COURT OF APPEALS IN *HANSFORD v. UNITED STATES,* 303 F.2d 219 (D.C. Cir. 1962)?**

The trial court charged the jury on entrapment as follows:

> The defendants here assert that they were victims of entrapment as to the crimes charged in this indictment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that the Government agents provide what appears to be a favorable opportunity is not entrapment.
>
> If, then, the jury should find beyond a reasonable doubt that the evidence in the case or that before anything at all occurred respecting the alleged offense involved in this case, the defendants were ready and willing to commit the crime charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendants are not victims of entrapment.

> On the other hand, if the evidence indicates and should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and do so only because they were induced or persuaded by some officer or agent of the Government, then it is your duty to acquit them. (App. 686a-687a).

The instruction that a person must have "no previous intent or purpose to violate the law" is fatally vague. This lack of procession is critical in the instant case, in view of the evidence presented that the Petitioner was engaging in gambling, a violation of the law, yet it was presently charged not with gambling but with bribery.

What was critical for the jury to understand when considering whether Petitioner had been entrapped to commit the bribery offense, was whether the Petitioner had a predisposition to commit bribery, not whether he was predisposed to gamble.

The critical issue is whether the defendant was predisposed to commit the offense for which he was charged. Clearly, a person who steals credit cards may not be predisposed to steal guns. *United States v. Borum*, 484 F.2d 424, 427, (D.C. Cir. 1978). However, the Fourth Circuit Court of Appeals refused to overturn Petitioner's conviction rejecting the claim that failure to make the distinction between gambling and bribery was reversible error.

The Fourth Circuit Opinion is in disagreement with two other Federal Circuit Courts of Appeals, the Fifth and the D.C. Circuit.

In *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962), a narcotics prosecution, the defendant took the stand and was cross-examined about his three (3) prior convictions (two for larceny, one for narcotics). The trial court charged the jury as follows:

> "[T]he law says that if an otherwise innocent person, not inclined to commit a criminal offense, is induced, is led

> into, is enticed by a police officer to commit a criminal offense, the prosecution can have no benefit from it and he would not be guilty. Understand that I say 'otherwise innocent person' who would not have committed the crime except for some enticement, or inducement ...you have got to take into consideration, the testimony on the part of the Government concerning Hansford's background,...you have got to consider that background, the whole of it, in determining whether he was an innocent man who would not have made that sale, but for being seduced into it. *Id.* at 221.

Judge Fahy for the D.C. Circuit Court of Appeals, however, in disagreement with the District Court and the Fourth Circuit Court of Appeals in the instant matter, disapproved of the above charge stating:

> [R]eadiness or predisposition is not established by evidence that the person is not 'innocent' in that he has a criminal record. Innocent in the context of entrapment means that the defendant would not have perpetrated *the crime for which he is presently charged* but for the enticement of the police official. Id. at 222 (emphasis supplied)

The Fifth Circuit Court of Appeals reiterated Judge Fahy's Opinion in the recent decision of *United States v. Wolffs*, 594 F.2d U.S. 77, (5th Cir. 1979). In *Wolffs, supra* the defendant was convicted of conspiracy to possess with intent to distribute marijuana, conspiring to distribute same, and abusing communication facilities in commiting a felony. His conviction was reversed for several reasons, of which failure to do the following was one.

> "The instruction also must be *unmistakeably clear* in informing the jury that if the evidence in the case leaves a reasonable doubt as to whether defendants had the predisposition to commit *an offense of the character charged*, apart from the Government inducement or persuasion, the defendant must be found not guilty (emphasis added)." 594 F.2d at 83.

This issue is presented to the Court to effectuate resolution of the conflict between the Fourth Circuit Court of Appeals and the Fifth and D.C. Circuit Court of Appeals.

2. WHETHER A COUNTY PROSECUTING ATTORNEYS OFFICE IS AN ENTERPRISE WHICH ENGAGES IN OR AFFECTS INTERSTATE OR FOREIGN COMMERCE WITHIN THE SCOPE OF THE RACKETEER INFLUENCE CORRUPT ORGANIZATION STATUTE (RICO) 18 U.S.C. §1961 through 1968?

The Racketeer Influence Corrupt Organizations (RICO) 18 U.S.C. §1961-1968, proscribes the operation of any "enterprise" by a pattern of racketeering activities. Section 1961(4) defines and "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

The only enterprise which Petitioner was allegedly associated with was the office of the prosecuting attorney of Hancock County, West Virginia, a statutory creation in the State of West Virginia. The duties of a county prosecutor are set out in West Virginia Code, Chapter 7, Article 4, §1 (MICHIE 1976 replacement volume). These duties include the enforcement of the criminal laws of the State of West Virginia, the defense and prosecution of all civil suits in which the State of West Virginia, and the County or the Board of Education is a party, as well as to assist the Attorney General of the State of West Virginia in the county and which the prosecutor serves.

As can be easily discerned, all authority and activity of the prosecutor is strictly local in nature. Therefore, any crimes involving the acts of the public official (employed by the office of the Prosecuting Attorney) in conducting the affairs of that office are necessarily local in nature. Consequently, there actions do not, and were not meant to, come within the ambit of the Organized Crime Control Act.

The key note of the RICO Statute is commerce. This is clearly demonstrated by the recent Third Circuit Opinion of *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977). *Frumento* affirmed the district courts finding that the Bureau of Cigarette and Beverage Taxes in the Pennsylvania Department of Revenue was an enterprise within the meaning of §1961(4) because of its close nexus with commerce. The Court went on to explain:

> As we read the Organized Crime Control Act, Congress was not civil to concern with limiting the protective and remedial features of the Act to business and labor organizations as it was with reducing the insidious capabilities of persons in organized crime to infiltrate the American *economy*. This accounts for the new civil remedies in the Act which permit equitable restraint of economic activity engaged in by organized crime as a substitute for criminal prosecution with its attendant procedural and constitutional protection for defendants. See Note, *Infiltration of Legitimate Business*, 124 U. Pa. L. Rev. 192, 196 (1975). In other words, Congress' concern was enlarging the number of tools with which to attach the envasion of the *economic* life of the country by the cancerous influence of racketeering activity; Congress did not confine its scrutiny to special areas of *economic* activity. Congress did not confine its scrutiny to special areas of *economic* activity. Congress had no reason to adopt a constricted approach to the solution of the problems. Congress was concerned with the infiltration of organized crime into the American *economy* and to the devastating effects of the racketeering activity had upon it. Yet, we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's *economic*, Congress intended to ignore an important aspect of the *economy* because it was state operated and state control? We think not. Congress declared that the provisions of Title IX 'be liberally construed to effectuate

> their remedial purposes.' 84 Statute 947. 563 F.2d at 1091 through 1091; (emphasis supplied)

In the very recent case of *United States v. Sutton*, 604 F.2d 260, 268, (6th Circuit 1979), the Court set forth:

> The legislative history conclusively demonstrates that RICO was enacted in response to the growing subversion of our society's legitimate institutions of *business* and *labor* by organized crime... (emphasis added)

In *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir. 1969) this Court held that the district court was correct in its holding that "...the main purpose of Congress in enacting Title IX was to prevent the infiltration of legitimate business by organized crime."

Whatever, since the Office of the Prosecuting Attorney is a *public entity*, it is not an enterprise within the meaning of the RICO Statute. *United States v. Mandel*, 415 F.2d 997, 1020-1022 (D.Md. 1976).

By the statute itself in its legislative history contain no express consideration of whether an "enterprise" may include *public* entities such as, governments and states. There exist no valid basis for construing the statute so broadly. Several other Circuit Courts[2] have given weight to Congress's instructions that the provisions of the Organized Crime Control Act should be "liberally construed to effectuate its remedial purposes." PUB. L.NO. 91-452 §904(a). What these courts have failed to note is that:

> The act with its civil and criminal provisions, has both punitive and remedial purposes. While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in

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[2]See *United States v. Cappetto*, 502 F.2d 1350, (7th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S.Ct. 1121, (1975); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977); *United States v. Altese*, 542 F.2d 104 (2nd Cir. 1976); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975) *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, (1976).

> criminal statutes are to be construed in favor of leniency. *Rewis v. United States*, 401 U.S. 808, 912, 91 S.Ct. 1056, 1059-1060 (1955). To do so would be to violate the principles of due process on which the canon of interpretation rests.

Consequently, the government cannot succeed in its quest for a conviction under RICO by merely proving a conspiracy of the accused to do certain prohibited acts. If this was all that was necessary, then Congress would not have enacted the statute, for it already had 18 U.S.C. §371 for such conduct. RICO was specifically enacted to help prevent the investment of ill-gotten gains in legitimate business enterprises.

The express language of 18 U.S.C. §1962(c) requires that the government prove the named enterprise be one engaged in, or the activities of which affect interstate commerce. *United States v. Vignola*, 464 Fed. Supp. 1091 (E.D. Pa. 1979). Since the Office of the Prosecuting Attorney is not engaged in interstate commerce, the only possible basis for finding this enterprise to be within the statute would be to prove that its activities affect interstate commerce.

The government attempted to prove the requisite interstate nexus by introducing evidence of: interstate phone calls, purchase of office equipment and supplies out of state, presence of out of state litigants and parties in lawsuits, existence of law enforcement investigations concerning out of state persons and use of national communications data systems of the National Crimes Information Center. It is contended that such evidence is inadequate to establish the jurisdictional element of the statute.

The only matter which could reasonable be viewed as affecting interstate commerce would be the purchase of office supplies and equipment. There was no showing made that these purchases were in any way affected by the matters at bar. Moreover, the Prosecuting Attorneys Office does not have the power or the authority, to purchase equipment or supplies; this must be done by County Commission Office

which is a separate and distinct entity. West Virginia Code Ann. §7-1-7 (1976 Replacement Volume).

The activities of the Prosecuting Attorneys Office may sometimes necessitate contact with other states, but by no stretch of the imagination may this contact by considered to excert a substantial affect on interstate commerce. Naturally, the office may purchase supplies which at some point move across state lines. If this is a valid basis for jurisdiction, then the activities of every household in America could be seen as affecting interstate commerce, and they also would come within reach of RICO.

Also, it was stipulated that none of the monies collected by Altomare and/or Donnell in connection with bribery, gambling, etc., was deposited in the County Commission Funds. Thus, no link exists between the payoff monies and the expenditure of same by or on behalf of the Prosecuting Attorney's Office in interstate or other commerce.

The question of whether a county prosecuting attorneys office is an enterprise within or affecting interstate commerce within the RICO Act is an important question of Federal Law and has not previously been considered by this Court.

3. WHETHER THE FOURTH CIRCUIT'S HOLDING THAT THE TERM "ENTERPRISE", WITHIN THE SCOPE OF THE RACKETEER INFLUENCE CORRUPT ORGANIZATION STATUTE (RICO) 19 U.S.C. §1961-1968, ENCOMPASSES AN ILLEGAL ASSOCIATION THAT IS PROVED ONLY BY FACTS CONSTITUTING THE "PATTERN OF RACKETEERING ACTIVITY," SHOULD STAND IN LIGHT OF THE EIGHTH CIRCUIT COURT OF APPEALS DECISION IN *UNITED STATES v. ANDERSON AND MOONEY*, 79-1809?

The three judge panel of the 8th Circuit Court of Appeals in *United States v. Anderson and Mooney*, 79-1089 offered the following interpretation:

> The Government's view of the RICO prosecutions against Anderson and Mooney leads to the conclusion that almost any two criminal acts affecting interstate commerce would fall within the ambit of RICO. Certainly Congress did not silently intend such a drastic reshuffle of the federal-state balance as the expansive theory of the Government would entail. (slip opinion)

In *Anderson and Mooney, supra.* involving two county officials in Arkansas who were accused of taking kickbacks in connection with county purchases of road maintenance supplies, the Court specifically held that the officials illegal scheme, entered into with a salesman, did not constitute an "enterprise" within the statutory meaning of the word. (slip opinion)

Accordingly in this maverick opinion, the three judge panel further explained the Government failed to prove the existence of the "enterprise" except through the acts of bribery which also established its proof of the "pattern of racketeering activity." (slip opinion) "The term 'enterprise' must signify an association that is substantially different from the acts which form the pattern of racketeering activity." (slip opinion)

By reversing the RICO convictions, the Eighth Circuit chose a polar stance from the Fourth Circuit. In the instant situation, the 4th Circuit permitted the term "enterprise" to encompass the illegal association between Petitioner and his co-defendants which was established only by facts which also constituted the predicate acts comprising the pattern of racketeering activity.

Accordingly, the question of whether the term "enterprise" encompasses an illegal association that is proved only by facts which also establish the predicate acts constituting the "pattern of racketeering activity" is presented to the Court to effectuate resolution of the conflict between the Fourth and Eighth Circuits.

4. WHETHER THE FOURTH CIRCUIT'S FAILURE TO REVERSE PETITIONER'S CONVICTION FOR FAILURE TO CHARGE THAT THERE MUST BE MORE THAN ONE PREDICATE OFFENSE FOR CONVICTION UNDER 18 U.S.C. §1962(d) CONSPIRACY, SHOULD STAND IN LIGHT OF THE FIFTH CIRCUIT COURT OF APPEALS DECISION IN *UNITED STATES v. ELLIOTT*, 471 F.2d 880, 903 (5th Cir. 1977)?

In order for a violation of 18 U.S.C. §1962(d) to be found, a defendant personally must commit two prescribed acts. *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975); In *United States v. Campanale, supra*, which was an 18 U.S.C. §1962(d) case, the Court recognized, even though a conspiracy was charged, it still was required that each individual defendant commit two acts of racketeering to establish a pattern and, therefore, make the individual a member of the conspiracy.

The same principle that in a conspiracy prosecution under 18 U.S.C. §1962(d) there must be more than one predicate offense, is clearly stated in *United States v. Elliott*, 571 F.2d 880, 903 5th Cir. 1977);

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly in the affairs of an enterprise *through the commission of two* or more predicate crimes. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the act. Id. (emphasis on original)

The above cases clearly demonstrate that the elements of §1962(d) conspiracy are different from those of 18 U.S.C. §371 conspiracy. As written in *United States v. Kessler*, 449 F.2d 1315 (2nd Cir. 1971), in order to prove a §371 conspiracy, "knowing joinder in an unlawful scheme on *one* occassion is sufficient. *Id.* (emphasis supplied)

In the instant case, the trial court charged the jury, and the Circuit Court of Appeals affirmed the following instructions:

> "...the government does not have to establish performance of all the avert acts as set out in the indictment. Proof beyond a reasonable doubt of one such act is sufficient.
>
> A conspiracy is a combination of two or more persons by conserted action to accomplish unlawful purpose, or to accomplish some lawful purpose by unlawful means.
>
> So, a conspiracy is a kind of partnership in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey or to disregard the law. (App. 673a)

Moreover, the Court repeated this incorrect charge to the jury, viz., only *one* overt act need be proven, four more times. This charge describes the conspiracy under §371. However, Petitioner was not charged with violating §371, he ws charged with violating §1962(d). The district court never charged under §1962(d), and consequently, the jury was not properly instructed on the crime for which the Petitioner was charged.

Prejudice to Petitioner is particularly obvious for had the proper standard been applied, it is foreseeable that an acquittal would have been granted him. The Government, in its opening address, explained the two predicate transactions involving Pecora. Evidence of one (the slot machine buy-back) was excluded. Accordingly, under a proper application of §1962(d) to the facts, the evidence is insufficient to establish a violation.

This issue is presented to the Court to effectuate resolution of the conflict between the Fourth Circuit and the Fifth Circuit.

5. WHETHER THE FOURTH CIRCUIT FAILURE TO REVERSE PETITIONER'S CONVICTION ON THE BASIS OF THE GOVERNMENT'S REFERENCE TO EVIDENCE WHICH HAD BEEN EXCLUDED, SHOULD STAND IN LIGHT OF *UNITED STATES v. LEON*, 534 F.2d 667 (6th Cir. 1976)?

It is well established that the United States Attorney may not inject improper or prejudicial material that deprives that accused of his right to a fair trial. *Berger v. United States,* 295 U.S. 78, 88, 58 S.Ct. 629 (1930); *United States v. Leon,* 534 F.2d 667, 679 (6th Cir. 1976).

The Court in *Leon, supra.* did have a four prong test for determining whether remarks made by a United States Attorney was harmless.

Of these four factors, the first one, the tendency to mislead the jury and prejudice the accused, is the prime consideration. In determining undue prejudcial affect "the inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecution was convinced of the accused's guilt." *McMillan v. United States*, 363 F.2d 165, 169 (5th Cir. 1966).

The prosecutor cannot assert that there was existent, but unstated, evidence of which the jury did not have the benefit. For example, in *McMillan*, the court overturned a conviction because the prosecutor expressed his personal belief in the Defendant's guilt and insinuated that he had additional information, by way of a reliable informer, that had been excluded by the court. The court explained this information as follows:

> "It is more probable that this led the jury to believe that the whole government establishment has already determined appellants to be guilty on a glut of evidence which by technical legalisms, was not put before them." *Id.* at 169.

The jury's determination of guilt must be based solely on evidence properly presented for their consideration. It is well settled that "remarks on the availability of unused evidence are clearly impermissible." *Ketchum v. United States*, 354 F.2d 715, 719 (1st Cir. 1965).

Therefore, any references to evidence which has been excluded by the court is certainly improper. *Garris v. United States*, 309 F.2d 862, 865, 866 (D.C. Cir. 1968); *Kitchell v. United States, supra.*

In the instant case, the United States Attorney in his opening statement, asserted that he would prove Petitioner was involved with some slot machines. During the trial, the trial court ruled that a tape recording, which contained the only evidence linking Petitioner with any slot machines, was inadmissible.

Petitioner, in his closing argument, properly pointed out that the United States Attorney has failed to prove that he was involved with any slot machines. During his rebuttal argument, the United States Attorney raised the issue of Petitioner's connection with the machines. Since all evidence regarding this matter had been excluded, he could not argue that his allegation had been proven. Instead, he discussed the fact that a number of bench conferences had resulted in this evidence being excluded. The United States Attorney focused the jury's attention on this matter, then instructed them that they were not permitted to consider it.

As a parting shot, he declared that "...the government does not need the slot machines...." App. 744a-745a The improper remarks were objected to at sidebar, out of the hearing of the jury. The court overruled the objection, and the jury was never instructed to disregard the improper and prejudicial remarks. The court suppressed this evidence in order to prevent it from influencing the jury's decision; but the prosecutor's remarks focused the jury's attention on the evidence, thereby, causing them to consider it anyway.

In *Kitchell v. United States, supra,* the Circuit Court reversed the conviction of co-defendants on the basis of the United States Attorney similarly referring to excluded evidence in his concluding argument. In reversing the conviction the Court stated:

> Whether by negligence or design, the government did its best to bring in and emphasis the very evidence which these defendants had sought to avoid by their motions for severance, and which the Court had carefully excluded, the government should have been particularly circumspect, instead of the opposite. We cannot sanction such improprieties..." *Id.* at 719.

In the instant case, the prejudicial affect of the United States Attorney's remarks became manifest when the surrounding circumstances are examined. The Government needed to prove that Petitioner had committed *two* predicate crimes, *i.e.* that Petitioner was involved with some slot machines. The government sought to imply that there was existing, but inadmissible, evidence which would satisfy the burden of proof; thereby prejudicing the Petitioner and making the jury more receptive to their theory of segmenting the single crime of bribery in order to create the requisite number of predicate crimes.

That the jury was misled and confused was clearly demonstrated by the jury's question during deliberations which revealed that they were pondering the Petitioner's connection with slot machines. They asked "Do Jo Jo Pecora have slot machines?" (App. 703a) This confusion would not have developed had the prosecutor confined his rebuttal argument to permissive subjects. Thus, the remarks did prejudice the Petitioner's right to a fair trial.

Whether the remarks were isolated or extensive, it is the second factor in the *Leon* test. Although the improper remarks were not extensive, there content and the court's failure to act to remove their effect upon the jury's mind must also be considered. Wherever, as in the instant case, the

remarks of counsel were outside of the record and highly prejudicial, case law requires the court to sustain the objection of counsel and to instruct the jury not to pay any attention to the remarks excepted to. In fact,

> Where argument of counsel is outside the record and prejudicial, the court should not only sustain objections thereto, but should instruct the jury to pay no attention to portions of argument to which objections are sustained." *Robinson v. United States*, 32 F.2d 505, 510, (8th Cir. 1929).

The district court, however, failed to give such an instruction and the Fourth Circuit Court of Appeals failed to reverse the conviction based on that failed instruction.

The Court, instead of resolving the confusion, instructed the Marshall to respond that: "it is for the jury to recall the evidence." This instruction was made over the Petitioner's objection. The total absence of any evidence connecting Pecora with any slot machines obligated the Court to so instruct the jury. The Court's response could only serve to exacerbate the prejudicial affect of the prosecutor's remarks.

The third prong of the *Leon* test, whether the remarks were deliberately or accidentally placed before the jury, is of critical importance in the instant case. The prosecutor cannot, in good faith, claim that he has accidently referred to evidence which has been suppressed. The Court has specifically found that this evidence should not be related to the jury. Consequently, the prosecutor's reference to this excluded evidence files in the fact of the Court's determination and can only be viewed as deliberate. See *Kitchell v. United States, supra.*

The strength of the competent proofs introduced to establish the guilt of the accused is the fourth and final prong of the test annunciated in *Leon*. The mere presence of evidence sufficient to sustain a guilty verdict is insufficient to

automatically classify the prosecutor's improper remarks as harmless err. *United States v. Leon*, 534 F.2d at 683. The evidence against Pecora, however was in no way conclusive, therefore the remarks of the prosecutor were clearly prejudicial.

This question is presented to the Court to effectuate resolution of the conflict between the Fourth and the Sixth Circuits.

CONCLUSION

It is respectfully submitted that this Honorable Court grant the Petitioner's Petition for Writ of Certiorari as he has presented one important question of Federal Law that has not previously been considered by this Court, and four areas of Federal Law which have caused conflict within the various Circuit Courts of Appeals.

Respectfully submitted:

MANIFESTO, DOHERTY, LOVE
& TALARICO, P.C.

By .....
John L. Doherty
Attorney for Petitioner

200 Lawyers Building
Pittsburgh, PA 15219
412-471-8893

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v. **Criminal No. 79-00003-E-02**

JOSEPH NICHOLAS PECORA,
Defendant.

U.S. DISTRICT COURT
FILED AT ELKINS, W.VA.
FEB 26, 1979
THOMAS F. STAFFORD
CLERK

ORDER

On February 16, 1979, came the United States of America by William A. Kolibash, Assistant United States Attorney for the Northern District of West Virginia, and also came the defendant, JOSEPH NICHOLAS PECORA, in person and by his attorney, John L. Doherty, for arraignment. The Court advised the defendant and his attorney that in view of the complex nature of this case, he would enter a plea of not guilty for the defendant. It was, therefore,

ORDERED that a plea of not guilty be entered, that pretrial motions on behalf of the defendant be filed on or before March 2, 1979, and that trial be scheduled at a later date. It was further

ORDERED that the bond earlier given be continued

ENTER: FEB 26, 1979

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District
of West Virginia

By: /s/ JEANNE W. O'LAUGHLIN
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v. **Criminal No. 79-00003-E**

ROBERT G. ALTOMARE,
JOSEPH NICHOLAS PECORA,
LEONARD Z. ALPERT,
JOSEPH APERFINE,
DONALD "DINGBAT" DELONG,
CONSTATINE "GUS" KARAS,
Defendants

VIOLATIONS:
18 U.S.C. § 1503
18 U.S.C. § 1962(c)
18 U.S.C. § 1962(d)
18 U.S.C. § 2

ORDER

It appearing to the Court that counsel for defendants in the above-styled criminal action, will, because of the difficulty in securing access to the discovery material until February 27, 1979, be unable to adequately prepare pre-trial motions, the Court, upon its own motion, does hereby

ORDER that the deadline for submission of pre-trial motions be extended until March 16, 1979, to give counsel an opportunity to study and investigate the discovery material.

ENTER: FEB 27, 1979

/s/ ROBERT E. MAXWELL
United States District Judge

U.S. DISTRICT COURT
FILED AT ELKINS, W. VA.
FEB 27, 1979
THOMAS F. STAFFORD
CLERK

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District
of West Virginia

By: /s/ JEANNE W. O'LAUGHLIN
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. **Criminal No. 79-00003-E**

ROBERT G. ALTOMARE,
JOSEPH NICHOLAS PECORA,
LEONARD Z. ALPERT,
JOSEPH APERFINE,
DONALD "DINGBAT" DELONG,
CONSTANTINE "GUS" KARAS,
Defendants.

**U. S. DISTRICT COURT
FILED AT ELKINS W. VA.
APR. 4, 1979
THOMAS F. STAFFORD
CLERK**

ORDER

On the 27th day of March, 1979, at Wheeling, came the United States of America by Stephen G. Jory, United States Attorney, William A. Kolibash and William D. Wilmoth, Assistant United States Attorneys for the Northern District of West Virginia, and also came the defendants, in person and by their counsel, Rudolph L. DiTrapano and Joseph Thomas; Joseph Nicholas Pecora with his counsel, John L. Doherty; Leonard Z. Alpert with his counsel, Stanley E. Preiser and Frederick D. Fahrenz; Joseph Aperfine with his counsel, Robert Yahn; Donald "Dingbat" DeLong with his counsel, James E. Seibert, and Constantine "Gus" Karas with his counsel, Thomas Livingston, for a hearing upon the various motions filed by these defendants. Upon consideration of all matters offered and presented including the argument of counsel, and for the reasons stated upon the record in open court, it is

ORDERED as follows:

1. (a) The motion of the defendant, Robert G. Altomare, that he be allowed to inspect the Grand Jury Minutes

of the Grand Jury which returned this indictment is granted as to the record of his testimony before such Grand Jury but is denied as to the record of any other person testifying before such Grand Jury;

(b) the motion that he be granted an extension of time in which to submit motions to dismiss is granted in accordance with the limitation set forth in Item 8 below;

(c) the motion for the production of exculpatory information and materials is granted;

(d) the motion to disclose interception of wire or oral communications and electronic surveillance is denied upon the representation of the United States that no such action was taken;

(e) the motion for discovery and inspection is denied as stated;

(f) the motion for transfer of trial within the district is denied; and

(g) the motion to compel the United States to elect is denied.

2. (a) The motion of the defendant, Joseph Nicholas Pecora, for a bill of particulars is denied except as set forth in Item 7 below;

(b) the motion for pre-trial discovery is denied as stated; and

(c) the motion to suppress evidence is denied without prejudice to this issue being raised at the trial of this action.

3. (a) The motion of the defendant, Leonard Z. Alpert, to dismiss this indictment or certain counts thereof is denied except as is set forth in Item 7 below;

(b) the motion for a bill of particulars is denied except as is set forth in Item 7 below;

(c) the motion for severance is denied except as is set forth in Item 9 below and the motion to inspect the statements of the other defendants is denied;

(d) the motion for a change of venue is denied;

(e) the request for disclosure of evidence is denied;

(f) the motion for disclosure of evidence intended to be used at trial is denied as stated;

(g) the motion to compel disclosure of exculpatory evidence is granted;

(h) the motion for an audibility hearing and visual hearing on certain evidence is denied without prejudice to this issue being raised at the trial of this action;

(i) the motion to compel government witnesses to be interviewed is denied upon the representation that no government witness is being held in protective custody and all are available to counsel for the defendants;

(j) the motion to suppress is denied witout prejudice to the issue being raised at the trial of this matter;

(k) the motion to excise portions of the tape and video recordings and the transcripts of the tape recordings and to suppress the tape and video recordings entirely without prejudice to the issue being raised at the trial of this action;

(l) the motion to disclose interception of wire or oral communications and electronic surveillance and the motion to disclose mail cover is denied upon the representation of the United States that no such action was taken;

(m) the motion for disclosure of grants of immunity, promises of leniency, or threats of prosecution, and any plea bargaining is granted and the motion for disclosure of any United States Department of Justice policy statements of or regulations concerning the selection for prosecution and/or prosection of "white collar" crimes is granted;

(n) the motion for the disclosure of all informers is denied upon the representation of the United States that no such informers were utilized in this case and that any such informers are revealed in the files of the United States Attorney which have already been made available to the defendants;

(o) the motion for the early production of Jenck's Act materials is denied;

(p) the motion for a "rap" sheet and other information on all prospective government witnesses is denied;

(q) the motion to require the government to disclose the manner of selecting the Grand Jury members is denied;

(r) the motion to produce the minutes of the Grand Jury which returned this indictment is granted as to the record of this defendant's testimony before such Grand Jury but is denied as to the record of any other person testifying before such Grand Jury;

(s) the motion to require the United States to disclose information as to the prospective petit jurors is denied;

(t) the motion for additional premptory challenges is denied without prejudice to this issue being raised at the trial of this matter;

(u) the motion for a hearing for the taking of evidence in support of these motions is denied;

(v) the motion for the extension of time to file memoranda of law in support of pre-trial motions is denied except as is set forth in Item 8 below;

(w) and the motion to compel the United States to elect or for severance of Counts or defendants is denied except as is set forth below in Item 7.

4. (a) the motion of the defendant, Joseph Aperfine, for the production of exculpatory evidence is granted;

(b) the motion for severence is denied except as is set forth in Item 9 below;

(c) the motion to strike certain paragraphs of the indictment is denied except as is set forth in Item 7 below;

(d) the motion for transfer within the district is denied;

(e) the motion to require the government to transcribe the tapes is denied;

(f) the motion to dismiss the indictment is denied except as is set forth in Item 7 below; and

(g) the motion for a bill of particulars is denied except as is set forth in Item 7 below.

5. (a) The motion of the defendant, Donald DeLong, for a bill of particulars is denied except as is set forth in Item 7 below; and

(b) the motion to dismiss the indictment is denied except as is set forth in Item 7 below.

6. (a) The motion of the defendant, Constantine "Gus" Karas, to dismiss the indictment is denied except as is set forth in Item 7 below;

(b) the motion for a bill of particulars is denied except as is set forth in Item 7 below; and

(c) the motion to suppress evidence and for the return of property is denied without prejudice to this issue being raised at the trial of this matter.

7. (a) The paragraphs of Count I of the indictment numbered 4(a), (b), (d), (e), (f), (g), (h), (i), (j), and (k) shall be struck from the indictment;

(b) as to paragraph 4(e) of Count I of the indictment, the United States shall file a bill of particulars stating the identity of the Grand Jury referred to therein;

(c) as to Count II of the indictment, the United States shall file a bill of particulars indicating the bribery

statutes of the State of West Virginia upon which it relies in the prosecution of this matter, and all paragraphs which rely upon West Virginia Code §61-5-5 shall be struck from the indictment;

(d) as to Count II of the indictment, the United States shall file a bill of particulars indicating the gambling statutes of the State of West Virginia upon which it relies in the prosecution of this matter and all paragraphs which rely upon West Virginia Code §61-10-1, 5, and 11 shall be struck from the indictment;

(e) as to Count III of the indictment, the United States shall file a bill of particulars stating the identity of the Grand Jury referred to therein and, identify with particularity the statutes of the State of West Virginia and the United States of America upon which this investigation was based. Upon the submission of this bill of particulars, the Court will take such further action and enter such additional orders as are deemed necessary.

8. The time period for the submission of additional motions, which raise matters as have not been considered by the Court, shall be extended to and including a date ten (10) days before the scheduled trial date of each particular defendant.

9. The trials of defendants, Robert G. Altomare, Leonard Z. Alpert, and Joseph Aperfine, shall be severed from the trials of the remaining defendants, such trial of the defendants, Robert G. Altomare, Leonard Alpert, and Joseph Aperfine, to be joined with the trial of Robert G. Altomare in Criminal Action No. 79-00007-E in which indictment the trial of Robert G. Altomare has been severed from the trial of the remaining defendants.

10. The trial of the defendants, Robert G. Altomare, Leonard Z. Alpert, and Joseph Aperfine, upon the charges contained in this indictment, joined with the defendant, Robert G. Altomare, in Criminal Action No. 79-00007-E,

shall commence at 10:00 a.m. on Monday, April 23, 1979, in the courtroom of this court in Wheeling, West Virginia, before the Honorable Franklin T. Dupree, Jr., United States District Judge.

11. The trial on the charges pending against the remaining defendants in this indictment shall be scheduled as the first criminal trial to commence at 10:00 a.m. on Monday, April 30, 1979, in the courtroom of this court in Wheeling, West Virginia.

ENTERED: APRIL 4th, 1979.

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District
of West Virginia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. **Criminal File No. 7-00003-E-01-02-03-04-05-06**

ROBERT G. ALTOMARE,
JOSEPH NICHOLAS PECORA,
LEONARD Z. ALPERT,
JOSEPH APERFINE,
DONALD "DINGBAT" DELONG,
CONSTANTINE "GUS" KARAS,
Defendants.

U.S. DISTRICT COURT
FILED AT ELKINS, W. VA.
APR 12 1979
THOMAS F. STAFFORD
CLERK

ORDER

A superseding indictment having been returned against the above named defendants by the Grand Jury of this Court on April 15, 1979, and the United States of America having moved that the original indictments in Criminal Action No. 79-00003-E be dismissed, and the Court perceiving no objections thereto, it is

ORDERED that the original indictment returned by the Grand Jury of this Court on February 6, 1979, be, and the same is hereby, dismissed.

ENTER: April 12, 1979.

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District of West Virginia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. :: **Criminal File No. 79-00003-E**

ROBERT G. ALTOMARE,
JOSEPH NICHOLAS PECORA,
LEONARD Z. ALPERT,
JOSEPH APERFINE,
DONALD "DINGBAT" DELONG,
CONSTANTINE "GUS" KARAS,
Defendants.

Violations:
18 U.S.C. § 1503
18 U.S.C. § 1962(c)
18 U.S.C. § 1962(d)
18 U.S.C. § 2

ORDER

On the 13th day of April, 1979, came the United States of America by Joseph W. Anderson, Assistant United States Attorney for the Northern District of West Virginia, and also came the defendants, ROBERT G. ALTOMARE, in person and by his attorney, James Seibert, JOSEPH NICHOLAS PECORA, in person and by his attorney, Carlton Rosencrance, LEONARD Z. ALPERT, in person and by his attorneys, Stanley E. Preiser and Frederick Fahrenz, JOSEPH APERFINE, in person and by his attorney, Carlton Rosencrance, DONALD "DINGBAT" DELONG, in person and by his attorney, James Seibert, and CONSTANTINE "GUS" KARAS, in person, and by his attorney Carlton Rosencrance, for arraignment in the above-styled criminal action.

The defendants each waived the reading of the Indictment and entered pleas of not guilty to each Count contained therein. Thereupon, the Court

ORDERED that the bonds executed by all defendants pursuant to the order of the Court entered on February 22,

1979, with respect to an indictment returned on February 6, 1979, be continued. It was further

ORDERED that the schedule for motions and trial established by the Court with respect to the above referenced earlier indictment remain in effect in this matter, except that the earlier ordered date for filing requested jury instructions and legal authorities shall be extended from Monday, April 16, 1979 to Wednesday, April 18, 1979.

ENTER: 4-23-79

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District of West Virginia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. **Criminal File No. 79-00003-E-02-05-06**

JOSEPH NICHOLAS PECORA,
DONALD "DINGBAT" DELONG,
CONSTANTINE "GUS" KARAS,
Defendants.

U. S. DISTRICT COURT
FILED AT ELKINS, W. VA.
APRIL 26 1979
THOMAS F. STAFFORD
CLERK

ORDER

Upon consideration of the representation of Joseph W. Anderson, Assistant United States Attorney for the Northern District of West Virginia, that numerous items of evidence being used in the trial of Criminal Action 79-3-E-01-03-04, now being held before the Honorable Franklin Dupree, in Wheeling, West Virginia, is required for the prosecution of this criminal matter; that certain witnesses now appearing in Criminal Action No. 79-3-E-01-03-04 are required for the prosecution of this criminal action; that upon information received from the Honorable Franklin Dupree, it is believed that the criminal trial which he is now conducting is not reasonably expected to be concluded until several days after April 30, 1979; the one courtroom type of facility available in the United States Courthouse in Wheeling, West Virginia, does not allow the conduct of more than one trial at the same time; it being the opinion of the Court that fundamental fairness requires that the trial of this criminal action be held in the Wheeling division of the Northern District, the immediate location of the alleged criminal activity; that the defendant, Constantine "Gus" Karas, is also a defendant in Criminal Action No. 79-6-E-01, which is scheduled for trial before the Honorable Charles H. Haden II on April 30, 1979, in Parkersburg, West Virginia; the necessary overlapping of

trials and related proceedings of these companion criminal actions, now pending, when considered in context with the complexity of the issues presented, compel the Court to recognize that the ends of justice are best served here by continuing the above matter for a short time beyond the routine Speedy Trial Act time limits and that such action outweighs the interests of the public and defendants to a speedy trial, it is, accordingly

ORDERED that the Court upon its own motion, in accordance with 18 U.S.C. §3161(h)(8)(a), grants a continuance in this criminal action and that the trial of this criminal action, scheduled for April 30, 1979, be continued and the same scheduled for and the trial to commence at 9:30 o'clock a.m., on May 21, 1979, in the Courtroom of the United States Courthouse in Wheeling, West Virginia.

ENTER: April 26, 1979

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. **CRIMINAL ACTION NO. 79-0003-E**
-02-05-06

JOSEPH NICHOLAS PECORA,
DONALD "DINGBAT" DELONG,
CONSTANTINE "GUS" KARAS,
Defendants.

U. S. DISTRICT COURT
FILED AT ELKINS, W. VA.
MAY 3, 1979
THOMAS F. STAFFORD
CLERK

ORDER

Joseph Nicholas Pecora, defendant in the above styled criminal action, has submitted a motion for a bill of particulars and a motion to dismiss the indictment. Upon consideration of all matters, it is

ORDERED that defendant's motions are denied.

ENTERED: May 3, 1979.

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U. S. District Court
Northern District of West Virgnia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v. : : **Criminal No. 79-0003-E-02**

JOSEPH NICHOLAS PECORA

U. S. DISTRICT COURT
FILED AT ELKINS, W. VA.
OCT 4, 1979
THOMAS F. STAFFORD
CLERK

ORDER

On an earlier date, the Court scheduled rulings on post-trial motions and sentencing in the above-styled criminal action on October 2, 1979. It now appearing that JOSEPH NICHOLAS PECORA, by counsel, has filed a motion to continue the hearing date of October 2, 1979, and the Court having considered the same, it is hereby

ORDERED that the defendant's motion be granted and that the previously scheduled appearance date of October 2, 1979 be vacated and that the rulings on post-trial motions and sentencing be re-scheduled at 10:00 A.M., on October 19, 1979, at Wheeling, West Virginia.

ENTER: October 4, 1979, as of October 2, 1979

/s/ ROBERT E. MAXWELL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ HELEN L. STEMFLE
Deputy Clerk

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v. **CRIMINAL NO. 79-00003-E-02**
79-00003-E-06

JOSEPH NICHOLAS PECORA and
CONSTANTINE GUS KARAS,
Defendants.

U. S. DISTRICT COURT
FILED AT ELKINS, W. VA.
OCT 23 1979
THOMAS F. STAFFORD
CLERK

ORDER

Defendants Joseph Nicholas Pecora and Constantine Gus Karas, by and through their attorneys Joseph L. Doherty and Thomas A. Livingston, have moved the Court to postpone sentencing for 30 to 45 days, thereby continuing the time of sentencing beyond the October 30, 1979, date now set.

Upon consideration of all matters, it is

ORDERED that the Defendants' Motion for Continuance be, and the same is hereby, denied. The briefing schedule, hearing date, and, if necessary following consideration of the motions, the sentencing date earlier scheduled will be maintained.

ENTER: October 23, 1979.

.../s/ ROBERT E. MAXWELL....
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U. S. District Court
Northern District of West Virginia

By: .../s/ JEANNE W. O'LOUGHLIN.....
Deputy Clerk

APPENDIX J

RECEIVED OCT 29 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v **CRIMINAL #79-0003-E**

ROBERT G. ALTOMARE, ET AL,
Defendants

ORDER

On October 19, 1979, came the United States of America by William A. Kolibash, Assistant United States Attorney for the Northern District of West Virginia, and also came the defendants, JOSEPH NICHOLAS PECORA, in person and by his attorney, John L. Doherty; and CONSTANTINE "GUS" KARAS, in person and by his attorney, Thomas A. Livingston. The attorneys for the defendants advised the Court that they needed additional time to review the transcript which had just been prepared in order to particularize their Motions for Judgment of Acquittal and/or A New Trial and requested that the Court delay disposition of the matter. For the reasons set forth by the defendants' attorneys, it was

ORDERED that the disposition of the matter be continued and re-scheduled for 4:00 P.M. on October 30, 1979 in Wheeling.

ENTER: October 26, 1979.

.../s/ ROBERT E. MAXWELL...
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U. S. District Court
Northern District of West Virginia

U. S. DISTRICT COURT
FILED AT ELKINS, W. VA.
OCT 26 1979
THOMAS F. STAFFORD
CLERK

By: .../s/ HELEN L. STEMFLE...
Deputy Clerk

United States District Court for
Northern District of West Virginia,

DEFENDANT

United States of America vs.
JOSEPH NICHOLAS PECORA

DOCKET NO. 79-00003-X-02

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date October 30, 1979

_____ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

__X__ WITH COUNSEL John L. Doherty
(Name of counsel)

PLEA

_____ GUILTY, and the court being satisfied that there is a factual basis for the plea, _____ NOLO CONTENDERE, __X__ NOT GUILTY

FINDING & JUDGMENT

___ NOT GUILTY. Defendant is discharged

There being a finding/verdict of { __X__ GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to violate the Racketeer Influence and Corrupt Organizations Act (RICO), in violation of Title 18, Section 1962(d), United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

----------FIVE (5) YEARS----------

and to pay a fine in the amount of $10,000.00. It was further ORDERED that the defendant's bond be continued pending the appeal in this case.

K-1

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE Nov. 1, 1979

...../s/ HELEN L. STEMFLE.....

( ) CLERK

( ) DEPUTY

SIGNED BY

__X X__ U.S. District Judge

_____ U.S. Magistrate

ROBERT E. MAXWELL

Date Nov. 1, 1979

APPENDIX K

APPENDIX L

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5311

UNITED STATES OF AMERICA,
Appellee,

v.

CONSTANTINE "GUS" KARAS,
Appellant.

No. 79-5320

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH NICOLAS PECORA,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT ELKINS. ROBERT E. MAXWELL, CHIEF DISTRICT JUDGE.

Argued: May 5, 1980 Decided: July 1, 1980

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge; and HALL, Circuit Judge.

John L. Doherty (Manifesto, Doherty, Love and Talarico on brief) for Appellant Pecora; Thomas A. Livingston (Dennis J. Clark, Livingston, Miller, O'Mallery & Clark on brief) for Appellant Karas; William A. Kolibash, Assistant United States Attorney (Stephen G. Jory, United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

Constantine "Gus" Karas and Joseph N. Pecora appeal from their respective convictions of violating the Racketeer Influenced and Corrupt Organizations Act [RICO Act], 18 U.S.C. §1962(d). Both men were charged with participating in a conspiracy to bribe county law enforcement officials in order to conduct illegal gambling activities. The government's evidence, gathered over a two-year period by state and federal officials, consisted primarily of the sheriff's testimony and numerous taped conversations between the sheriff and various members of the conspiracy, including Karas and Pecora. After a five-day trial, the jury returned guilty verdicts against both men. After the district court denied their post-trial motions, Karas and Pecora noted several assignments of error. Finding no error, we affirm the convictions.

I. Joint Assignments of Error

Both Karas and Pecora allege that the district court committed error by: (1) giving an improper jury charge on the issue of entrapment; (2) giving an incorrect jury charge pertaining to the conspiracy element of §1962(d); (3) failing to grant the motion to sever their trials; and (4) failing to rule that the evidence was insufficient to sustain the verdicts. Appellants argue that a proper entrapment instruction would require the government to show that both men were already predisposed to commit the acts of bribery and gambling underlying the RICO Act violation. Counsel contends that no such predisposition was established at trial[1] and that the entrapment instruction given was overly broad and fatally vague. When read in its entirety,[2] the charge clearly

[1]Karas asserts that he was entitled to a defense of entrapment as a matter of law. In view of the factual dispute regarding this issue, the trial court properly submitted it to the jury for resolution.

[2]The trial court instructed the jury as follows:

> If, then, the jury should find beyond a reasonable doubt from the evidence in this case, that before anything at all occurred respecting

continued

informed the jury to apply the law of entrapment to the charge in the indictment, which was conspiracy to violate the RICO Act, not violations of bribery and gambling statutes. Appellants' contention to the contrary is without merit.

Karas and Pecora also challenge the propriety of the conspiracy instruction. Their main objection is that the trial judge erroneously charged the jury as to a conspiracy under 18 U.S.C. §371, which requires only one overt act, rather than §1962(d), which requires two racketeering activities. *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1977), and *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), mandate at least two predicate offenses to establish a conspiracy under §1962(d). The district court did give a general conspiracy charge, similar to that under §371, requiring only one overt act. However, the trial judge further instructed the jury that the appellants could not be convicted under §1962(d) unless the purpose of the conspiracy was to violate the RICO Act and that at least two racketeering acts had occurred.[3] Viewing the overall conspiracy charge, there is no

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the alleged offense involved in this case, the defendants were ready and willing to commit the *crime charged in the indictment*, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendants are not victims of entrapment.

On the other hand, if the evidence indicates and should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit *any offense of the character here charged*, and did so only because they were induced or persuaded by some officer or agent of the government, then it is your duty to acquit them. (Emphasis supplied)

[3]The specific instructions provide, in part, that:

The defendant, or any of them, may not be convicted simply because they engaged in a conspiracy. The prosecution must show beyond a reasonable doubt that the predominate purpose of the conspiracy was to violate Title 18, United States Code, Section 1962(c). . . .

• • •

Third: that at least two acts of racketeering activity occurred . . . and that the acts were connected with each other by some common scheme, plan, or motive. . . .

Fourth: that through the proposed commission of two or more connected acts the defendants would conduct or participate in the conduct of the enterprise.

reason to believe that the jury was misled regarding the requirement of at least two predicate offenses to find a violation under §1962(d).

Appellants next argue that the district court abused its discretion by failing to grant a severance of their trials. They allege substantial prejudice by the refusal of the trial court to grant any of the motions for severance under Rule 14 of the Federal Rules of Criminal Procedure. Appellants urge that their joint trial improperly allowed the jury to consider evidence inculpatory to one defendant as pertaining to both of the accused.

Both Karas and Pecora were indicted together[4] based upon their interrelated illegal activities. Absent a prejudicial effect, persons indicted together may generally be tried together. *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971). The appellants have failed to show that the denial of their motions for severance deprived them of a fair trial. *United States v. Mandel*, 415 F. Supp. 1033 (D. Md. 1976), *vacated on other grounds*, 591 F.2d 1347 (4th Cir. 1979), *conviction aff'd en banc* 602 F.2d 653 (4th Cir. 1979). Rather, the district court's instructions were calculated to ensure that the jury considered the evidence only as to the defendant against whom it was admitted. We do not think that the trial court abused its discretion in denying the motions for severance. *See, United States v. Dorsett*, 544 F.2d 687 (4th Cir. 1976).

The last joint assignment of error challenges the sufficiency of the evidence underlying the convictions. Pecora contends that the evidence failed to show that he engaged in

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[4]The federal grand jury indicted several persons for violating the RICO statute in connection with the alleged bribery and gambling activities in Hancock County, West Virginia. Before trial, the trials of the remaining defendants were severed from that of Karas and Pecora due to the anticipated complexity of the testimony and to minimize any possible prejudicial effect which inculpatory evidence admitted against one defendant may have had upon the remaining co-defendants.

a pattern of racketeering activity; i.e., commission of at least two of the acts outlined in §1961(5). He admits to making only one bribe and argues that two other bribes, allegedly made by other defendants in his behalf, would at the most only constitute installments of one overall bribe. We follow the reasoning of other federal courts in rejecting this installment approach to bribery cases. *E.g., United States v. Anderson,* 509 F.2d 312 (2d Cir. 1974); *United States v. Alaimo,* 297 F.2d 604 (3rd Cir. 1961).

Karas and Pecora also urge that the RICO statute is not applicable to the allegedly illegal activities because there was no "enterprise" or impact on interstate commerce regarding the bribery and misuse of the offices of the county law enforcement officials. We have already rejected similar arguments regarding the scope of the RICO statute in *United States v. Whitehead,* No. 78-5160 (4th Cir. Mar. 20, 1980), and *United States v. Altomare,* No. 79-5146 (4th Cir. June 17, 1980).[5]

II. Karas' Assignments of Error

In addition to the above issues, appellant Karas raises two others: (1) whether the trial court erred by admitting evidence of other illegal activity, as well as evidence regarding monies seized from unindicted persons; and (2) whether the court should have allowed Karas to testify under a grant of immunity given in a previous case.

Karas contends that the playing of a taped conversation in which he admitted to bribing local police officers was irrelevant to the charged offense and was so prejudicial as to outweigh its probative value. We believe the trial court

[5] *United States v. Altomare* was a companion case in which this Court specifically held that: (1) the office of the prosecuting attorney was an "enterprise" under the statute, and (2) that there was a sufficient nexus with interstate commerce to come within the purview of the RICO Act. *See also United States v. Baker,* No. 79-5167/68/69 (4th Cir. Mar. 17, 1980) (county sheriff's office is an enterprise under RICO); *United States v. Grzywacz,* 603 F.2d 682 (7th Cir. 1979), and *United States v. Brown,* 555 F.2d 407 (5th Cir. 1977) (city police departments were enterprises under RICO).

balanced the possible prejudicial effect against the relevancy of the evidence and properly admitted it to show Karas' predisposition to commit the charged offense in view of the defense of entrapment. Such a decision is in accord with *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); and *United States v. Koska*, 443 F.2d 1167 (2d Cir.), *cert. den.*, 404 U.S. 852 (1971). Moreover, this evidence would also be properly admitted for the purpose of showing a furtherance of the challenged conspiracy under Rule 801(d)(2)(E), Federal Rules of Criminal Procedure.

Karas also challenges the admission of monies seized by federal agents in January 1979 from the business premises of Karas and four other alleged co-conspirators. He claims the evidence is irrelevant because some monies were seized from unindicted persons and because there was no connection shown between the monies and the alleged gambling and bribery activities. Counsel claims that the jury's reaction to the large amounts of cash would adversely affect their ability to impartially evaluate such evidence and is therefore prejudicial.

The monies in question were seized from the establishments in which gambling had been observed and whose owners were purportedly members of the conspiracy to which Karas belonged. The trial judge admitted this evidence to show the source of the monthly $1500 bribe to county law enforcement officials. We do not believe that the seized monies were either so unrelated to the alleged conspiracy or so prejudicial to the appellant as to outweigh their obvious relevancy to the issues at trial.

Karas' final argument presents a somewhat novel approach concerning the breadth of a grant of immunity. Karas had been granted immunity by the government to testify at a previous trial of one of the co-conspirators. Although he never testified at the trial, there was a stipulation as to his testimony. Before testifying at his own trial,

Karas sought a preliminary ruling that the grant of immunity was still in effect. The government argued that the grant of immunity was restricted to the earlier case and only precluded questioning Karas about this prior stipulated testimony. During oral argument to this Court, Karas' counsel stated that he sought the preliminary ruling in order to prevent Karas' testimony from being used in subsequent criminal proceedings. Counsel contends that the denial of immunity in the present proceeding impairs Karas' right to present a defense as in *Washington v. Texas,* 388 U.S. 14 (1967).

The decision to grant immunity is within the sole discretion of the prosecution. *Thompson v. Garrison,* 516 F.2d 986 (4th Cir. 1975); *In re Kilgo,* 484 F.2d 1215 (4th Cir. 1973). Thus, the district court has no authority to confer immunity *sua sponte. United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979); *In re Kilgo, supra.* Since immunity is granted as a substitute for a person's Fifth Amendment rights, the refusal to grant immunity permits the defendant to exercise his usual rights under the Constitution. Every defendant must decide whether or not to testify. Karas cannot extend his Fifth Amendment rights, via an earlier grant of immunity as a witness, to protect his testimony as a defendant in subsequent judicial proceedings *ad infinitum.*

Karas' reliance on *Washington v. Texas* is misplaced. In *Washington,* a state statute allowed a co-defendant to testify for the prosecution but not for the defendant. This case does not deal with the issue of testimony being made unavailable since it was Karas' choice not to take the stand. The district court correctly recognized that the defendant had no right to a grant of immunity and properly refused to extend the earlier grant to the present proceedings.

III. Pecora's Assignments of Error.

Appellant Pecora also alleges two other grounds as error: (1) that the government's closing argument was

improper and prejudicial; and (2) that he was prejudiced by the trial court's refusal to excise part of the indictment.

During the trial, the district judge had ruled that certain evidence alleging Pecora's involvement with slot machines was inadmissable. In his closing argument, defense counsel reminded the jury that the government had promised, in its opening statement, to prove that Pecora had slot machines, but instead no such evidence had been put before the jury regarding this allegation. In rebuttal, the Assistant United States Attorney stated that the trial court had prevented the government from presenting any evidence of the slot machines, but that in any event such evidence was not needed for a conviction because other testimony established three acts of bribery by Pecora. Shortly after this rebuttal, defense counsel moved for a mistrial. The trial judge denied the motion and indicated he would cure any problem of prejudice by giving appropriate instructions during his charge to the jury, which he later did.[6]

Pecora argues that the remarks made during rebuttal were not harmless under the test in *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), and deprived him of a fair trial. After evaluating the prosecution's statements in light of the four-prong test in *Leon*, we do not believe that Pecora was denied his due process right to a fundamentally fair trial.

[6]Some of the cautionary instructions given by the trial court are as follows:

> The evidence in the case consists of the sworn testimony of the witnesses ... and all exhibits received in evidence. ...
>
> • • •
>
> The statements and arguments of counsel are, of course, not evidence in the case, unless made as an admission or stipulation of fact.
>
> • • •
>
> Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded, or considered only for the limited purposes for which the evidence was admitted.

Although the remarks of the government attorney are not condoned by this Court, they clearly do not rise to the level of egregious misconduct which was condemned in such cases as *Miller v. Pate,* 386 U.S. 1 (1967), and *Brady v. Maryland,* 373 U.S. 83 (1963). Considering the trial judge's charge to the jury regarding what evidence it should or should not consider, such trial error, if any existed, would be harmless under the rationale of *Donelly v. DeChristoforo,* 416 U.S. 637 (1974).

Pecora also asserts that he was prejudiced by the trial court's refusal to excise the allegation in the indictment that he was engaged in business of an unknown nature in addition to his vending machine company.[7] The purpose for requesting this deletion was to counter any possible influence on the jury by media allegations that Pecora had ties with organized crime.

The government contends that the evidence presented to the grand jury of Pecora's gambling activities supported the allegations in the indictment. In addition, the extensive and painstaking jury selection proceedings ensured that only jurors who are unaffected by any media coverage were actually seated. We agree with the government's contentions and uphold the refusal of the trial court to delete this part of the indictment.

IV. Conclusion

Based on consideration of the issues raised by Karas and Pecora, we find the assignments of error to be without merit and affirm their convictions. The judgment of the district court is

AFFIRMED.

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[7]The challenged portion of the indictment relating to Pecora read as follows:

> Joseph Nicholas Pecora resided in Hancock County, West Virginia, was an owner/operator of J & Z Vending, *and was engaged in other business unknown to the Grand Jury.*

Defense counsel sought deletion of the above underline portion of the indictment.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5320

UNITED STATES OF AMERICA,
Appellee,

versus

Joseph Nicholas Pecora
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Field, and Judge Hall.

For the Court,

FILED
Jul 28 1980
U.S. Court of Appeals
Fourth Circuit

/s/ WILLIAM K. SLATE, II
Clerk

CERTIFICATE OF SERVICE

I, John L. Doherty, Esquire, do hereby certify that a true and correct copy of the PETITION FOR WRIT OF CERTORARI was mailed upon the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of September, 1980, by first class mail postage pre-paid.

.../s/ JOHN L. DOHERTY...
John L. Doherty

AFFIDAVIT OF MAILING

The undersigned hereby certifies that the Petition for Writ of Certiorari to the Superior Court of the United States filed by Joseph Nicholas Pecora, has been mailed first class, postage pre-paid, through the United States Postal Service on Thursday, September 25, 1980.

.../s/ JOHN L. DOHERTY...

John L. Doherty

Attorney for Petitioner

see 80

486